SYKT PEMBANGUNAN TENAGA MURNI SDN BHD

v.

GARDEN MASTERS (M) SDN BHD

HIGH COURT MALAYA, SHAH ALAM
LOW HOP BING J
[ORIGINATING SUMMONS NO: 24-640 OF 1996]
13 DECEMBER 1996

LAND LAW: *Restraints on dealings - Caveat - Whether shareholder of company could apply to remove caveat lodged on land of company - Whether plaintiff had locus standi - Whether plaintiff aggrieved person - National Land Code 1965, s. 327(1)*

CIVIL PROCEDURE: *Appeal - Whether plaintiff bound by order of court on company's suit - Whether plaintiff could bring action qua shareholder on behalf of company while appeal pending*

The plaintiff was one of the shareholders of a company known as Kundang Lakes Country Club Berhad ('Kundang'). The defendants had lodged a caveat on the lands of which Kundang was the registered proprietor and the plaintiff had applied to remove the said caveat. Kundang had also filed an originating summons to remove the said caveat and the trial judge had ordered that Kundang's application be proceeded as if it was a writ action and against that order Kundang had appealed to the Court of Appeal. The issues before the court were: (i) whether the plaintiff had *locus standi* to make the application; and (ii) if the answer to (i) was in the affirmative, whether the defendant had a caveatable interest.

Held:

[1] The golden rule in interpreting a statute such as the National Land Code 1965 ('the NLC'), is that the words used therein should be given the ordinary meaning. In giving the words in s. 327(1) of the NLC the ordinary and natural meaning, only a person who is affected by the existence of a caveat has a right in law to apply for its removal.

[1a] The plaintiff was one of the shareholders of Kundang, which under the provisions of the Companies' Act 1965, s. 16(5), was a legal entity distinct from its members, capable of suing and being sued. The plaintiff was suing for an alleged wrong done to Kundang and it could not sue *qua* shareholder for a wrong allegedly done to the company since the company was the true and proper plaintiff.

[2] In a company, the shareholders have entered into an *inter se* contract by means of the articles of association concerning mode of governing the affairs of the company. It is impermissible for the shareholders to come to court and claim that damage is being caused to the company. Therefore on general principle of justice and convenience, the proper plaintiff, in the case of a damage caused to a company, should be the company itself.

[2a] The plaintiff in the case before the court was not the proper plaintiff to bring any action wherein it was alleged that there was damage done to Kundang and not to the plaintiff *qua* shareholder. Any allegation of loss or threat to Kundang should be raised by Kundang as the proper plaintiff to redress this loss or threat.

[2b] The application by the plaintiff was a "backdoor entry" and constituted an attempt *qua* shareholder to seek removal of the caveat on behalf of Kundang. That action should not be brought before the court for it amounted to a duplicity of action, as Kundang had filed a summons for the removal of the caveat. As a shareholder the plaintiff was bound by the order of the court concerning the Originating Summons of Kundang and must await the outcome of the appeal. If the application of the plaintiff was allowed, it would amount to a judgment in favour of Kundang and would constitute the pre-emption of the appeal that was pending, resulting in the usurpation of the powers and functions of the Court of Appeal.

[3] The plaintiff was one of the sixty-odd shareholders of Kundang and should it be allowed to use the court as a forum for the alleged grievances suffered by Kundang arising from the entry of the caveat, it would open the floodgates of litigation resulting in multiplicity of actions and there would be no finality in relation to the issue of the caveat on Kundang's land. The court therefore found that the plaintiff had no *locus standi* in bringing the action against the defendant.

[Plaintiff's application dismissed.]

Cases referred to:
Foss v. Harbottle [1843] 2 Hare 461 ***(foll)***
Paidah Genganaidu v. The Lower Perak Syndicate [1974] 1 MLJ 220 FC ***(cit)***
Salomon v. Salomon & Co [1897] AC 22 ***(refd)***
Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd & Anor [1997] 1 CLJ 529 ***(foll)***
Ting Chong Maa v. Chor Sek Choon [1989] 1 CLJ 813 ***(cit)***

Legislation referred to:
Companies Act 1965, s. 16(5)
National Land Code 1965, s. 327(1)
Rules of the High Court 1980, O. 28 r. 8.

For the plaintiff - Shahuh Amiruddin (JC Fernandez with him); M/s JC Fernandez & Co
For the defendant - Sharon Concisom; M/s K Nadarajah & Partners

Reported by Eugene Ong

JUDGMENT

Application

In this originating summons encl. (1), the plaintiff sought an order to remove a private caveat lodged by the defendant and also for consequential orders.

Facts Of The Case

The plaintiff is a shareholder in a company known as Kundang Lakes Country Club Berhad ('Kundang') holding 1,500,000 shares, equivalent to 17.64% of the issued share capital of Kundang.

Kundang is the registered proprietor of all the lands held under H.S.(D) 21918, 21919, 21920 and 21921 for Lots No. P.T. 8724, 8725, 8726 and 8727 respectively, situate in the Mukim of Rawang, District of Gombak, in Negeri Selangor Darul Ehsan ('the said Lands').

The defendant has lodged a caveat on the said Lands on 16 January 1995, except for the land described as H.S.(D) 21920 for Lot No. P.T. 8726.

The said Lands are encumbered with a first legal charge in favour of Malaysian International Merchant Bankers Berhad. The plaintiff alleged that by reason of the caveat, Kundang was unable to continue with the development and has defaulted payment resulting in the chargee demanding payment. Further loans have been obtained from Arab-Malaysian Merchant Bank Berhad, but according to the plaintiff, because of the existing caveat, it is unable to avail itself of the facility and redeem the said lands.

The defendant has lodged the caveat on the ground that it has expanded enormous sums of money in developing the said lands in the form of turfing and landscaping, thereby enhancing the value of the said lands, and the land owner ie, Kundang has failed to make payments towards account thereof. The defendant also entertained some worries that Kundang would sell the said lands without the defendant's knowledge.

The defendant has also instituted a civil action against Kundang in the Shah Alam High Court vide Civil Suit No. 22-220-1995, while Kundang, (which, as stated above, is the company in which the plaintiff is a shareholder, holding 17.64% of the issued share capital thereof) has filed Originating Summons No. 24-461-95 on 19 May 1996 ('Kundang's Originating Summons') asking for an order to remove the said caveat. Faiza Tamby Chik, J had ordered that Kundang's Originating Summons be proceeded with as if it was a writ action, pursuant to O. 28 r. 8 of the Rules of the High Court 1980. Against that order, Kundang has filed an appeal to the Court of Appeal, which appeal is still pending before that court.

Plaintiff's Contention

Before me, the plaintiff contended as follows:

1. The plaintiff is an aggrieved person entitled to make this application and the grievance arises for the following reasons:

   (1) Chargee's notice to appoint receiver and manager threatens and jeopardises the plaintiff's investment in Kundang;

   (2) Call for further capital contribution will entail additional expenses and will have adverse impact on the plaintiff's cash flow;

   (3) If the Plaintiff did not contribute further capital in response to such a call, then its 17.64% shareholding in Kundang will be diluted;

   (4) As the existence of the caveat impedes further improvement on the said Lands, the holding cost will increase multifold and the plaintiff's investment returns in Kundang will be affected and all these will entail a loss.

2. The defendant has no caveatable interest in law.

Defendant's Response

In reply, the defendant argued as follows:

1. The plaintiff has no locus standi;

2. The plaintiff did not disclose Kundang's Originating Summons, for the removal of the same caveat, which was ordered to be proceeded with as if it was a writ action and is currently pending appeal;

3. The plaintiff is bound by the decision made in Kundang's Originating Summons.

4. The indoor management rule for Kundang has no place in the plaintiff's application.

5. The defendant has a caveatable interest.

Issues For Determination By The Court

From the affidavits and the submissions advanced on behalf of the respective parties herein, I am of the view that the issues for determination by the court are as follows:

1. Whether the plaintiff has the locus standi to make this application?

2. If the answer to issue 1 is in the affirmative, whether the defendant has a caveatable interest?

Locus Standi Of The Plaintiff

The plaintiff relies on s. 327(1) of the National Land Code (NLC), which reads:

> **Any person or body aggrieved** by the existence of a private caveat may at any time apply to the court for an order for its removal, and the court (acting, if the circumstances so required, *ex parte*) may make such order on the application as it may think just. (Emphasised added)

This section of the NLC does not define or restrict the nature or the extent of the grievance.

The golden rule in interpreting a statute such as the NLC is that the words used therein should be given the ordinary and natural meaning. Applying this golden rule of interpretation and giving the words employed in s. 327(1) their ordinary and natural meaning, I hold that only a person who is affected by the existence of a caveat has a right in law to apply for its removal.

In my judgment, the plaintiff is merely one of the shareholders of Kundang which is different from the company itself. It has never been doubted that a company registered under the Companies Act 1965 is a body corporate, capable of exercising all the functions of an incorporated company and of suing and being sued: s. 16(5) of the Companies Act 1965. Subject to some exceptions (in which the corporate veil may be lifted) which do not apply to the facts of the instant case, it is trite law that a corporation is a legal entity distinct from its members, be they individuals or corporate bodies. This principle has

a been firmly established since *Salomon v. Salomon & Co.* [1897] AC 22 HL and has been recently restated by the Federal Court in *Sunrise Sdn. Bhd. v. First Profile (M) Sdn. Bhd. & Anor* [1997] 1 AMR 1, 11.

In essence this is an application brought by the plaintiff as a shareholder of Kundang and he is suing for an "alleged wrong" done to Kundang. In my b view, a shareholder of a company such as the plaintiff cannot *sue qua* shareholder for a wrong allegedly done to the company, since the company is *prima facie* the true and proper plaintiff: This is universally known as the rule in *Foss v.Harbottle* [1843] 2 Hare 461. This rule has been upheld and applied in our jurisdiction eg, *Paidah Genganaidu v. The Lower Perak* c *Syndicate* [1974] 1 MLJ 220 FC; *Ting Chong Maa v. Chor Sek Choon* [1989] 1 MLJ 477 at 478 HC. This rule has also gained recognition in all common law jurisdictions. The rule has been aptly described as one of respect for the "indoor or internal management". A company has been formed, the shareholders have entered into inter se contract by means of the Articles of d Association, concerning mode of governing the affairs of the company. If the shareholders are permitted to go to court for every difference of opinion on how best to govern the company it may become impossible to run the affairs of the company at all. On general principle of justice and convenience, therefore the proper plaintiff in case of a damage caused to a company should e be the company itself.

The rule in *Foss v. Harbottle* was based on the recognition of the fact that, in law, the company and its shareholders are separate entities. It is impermissible for the shareholders to come to the court and claim that damage was being caused to the company; only the company can complain of the f damage and no one else.

The plaintiff in the instant case, in my judgment, is not the proper plaintiff to bring any action wherein it is alleged that there is damage to Kundang and not the plaintiff qua shareholder. Hence, any allegation of loss or threat to g Kundang may be raised by Kundang as "the proper plaintiff" to redress this loss or threat ie, by Kundang bringing an action in court for and on behalf of its shareholders, which Kundang did on 19 May 1996 *vide* Kundang's Originating Summons, for removal of the said caveat. As alluded to above, when the matter came up for hearing before Faiza Tamby Chik, J the matter h was converted into a writ action under O. 28 r. 8. Kundang then filed an appeal to the Court of Appeal against the decision. As a shareholder of Kundang, the plaintiff is bound by the order of the court in Kundang's Originating Summons and must await the outcome of the appeal.

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In the circumstances, the application by the plaintiff in the instant case is a "back door entry" and constituted an attempt qua shareholders to seek removal of the caveat on behalf of Kundang once again. Since Kundang has filed an appeal in the Court of Appeal, this action should not be brought before the High Court in Shah Alam again, as this is the most glaring illustration of a duplicity of action which is undesirable and should not be allowed to proliferate.

In the event that this court allows the plaintiff's application, this would amount to a judgment in favour of Kundang in Kundang's Originating Summons and would constitute the pre-emption of the appeal pending in the Court of Appeal, thereby resulting in the usurpation of the powers and functions of the Court of Appeal. Further, the plaintiff is one of the 60-odd shareholders in Kundang. If everyone of these shareholders were allowed to use the court as a forum for the alleged "grievances" suffered by Kundang arising from the entry of the caveat, this would open the floodgates of litigation resulting in multiplicity of actions. There would be no end to litigation nor finality in relation to the issue of the caveat on Kundang's lands. The rule in *Foss v. Harbottle* is based and developed on sound principles. In my judgment, I can only logically conclude that the plaintiff has no *locus standi* in bringing this action. I do not see the necessity to consider the second issue. Hence, I dismiss the plaintiff's application herein with costs.